Dec 23 1999

(20)

No. 99-62

Supreme Court, U.S.
FILED
DEC 23 1999
CLERK

In The

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,

Petitioner,

v.

JANE DOE, Individually and as next friend for her minor children, Jane and John Doe, Minor Children; Jane Doe #2, Individually and as next friend for her minor child, John Doe, Minor Child, and John Doe, Individually,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICI CURIAE THE TEXAS JUSTICE FOUNDATION AND LISTED STUDENTS, PARENTS, TEACHERS, LEGISLATORS, AND BLANCO INDEPENDENT SCHOOL DISTRICT AS AMICI SUPPORTING PETITIONER

LINDA L. SCHLUETER
Texas Bar No. 24000127
8122 Datapoint, Suite 812
San Antonio, TX 78229
Phone: 210-614-7157
Fax: 210-614-6656

Counsel of Record
for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

26pp

QUESTION PRESENTED

Whether Petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTERESTS OF THE AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 6

ARGUMENT 7

I. PETITIONER'S POLICY PERMITTING STUDENT-LED, STUDENT-INITIATED PRAYER AT FOOTBALL GAMES PASSES CONSTITUTIONAL MUSTER UNDER THE ESTABLISHMENT CLAUSE 7

A. Allowing the Free Exercise of Religion Is Not an Establishment of Religion, and Therefore, Student-Led, Student-Initiated Prayer Merely Allows Students to Express Their Religious Views 8

B. Permitting Voluntary Messages or Invocations Is Also Consistent with the Intent of the Founding Fathers 12

II. THE ESTABLISHMENT CLAUSE AND THE FREE EXERCISE CLAUSE SHOULD BE READ IN HARMONY BECAUSE THEY SHARE A COMMON PURPOSE TO SECURE RELIGIOUS LIBERTY 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Board of Education v. Mergens, 496 U.S. 226 (1990) 8

Chandler v. James, 180 F.3d 1254 (1999) ..7, 8, 18, 19, 20

Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 20

Doe v. Duncanville ISD, 70 F.3d 402 (5th Cir. 1995) 9

Doe v. Santa Fe ISD, 168 F.3d 806 (5th Cir. 1999) ..9, 10

Engel v. Vitale, 370 U.S. 421 (1962) 8

Lee v. Weisman, 505 U.S. 577 (1992) 8, 11

McCollum v. Board of Education, 333 U.S. 203 (1948) ..8, 19

Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995) 10, 11

School District of Abington Township v. Schempp, 374 U.S. 203 (1963) 8, 12, 19

Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) 7

Torcaso v. Watkins, 367 U.S. 488 (1961) 16

Wallace v. Jaffree, 472 U.S. 38 (1985) 13, 15, 16, 19

Walz v. Tax Commission, 397 U.S. 664 (1970) 12

Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993) 11

Zorach v. Clauson, 343 U.S. 306 (1952) 16, 17

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION

U.S. CONST. amend. I. 12, 14, 17, 19, 20

OTHER

David Barton, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, AND RELIGION ch. 2 (1998) 13

T. Jeremy Gunn, A STANDARD FOR REPAIR ch. 2 § B (1992) 13

Letter from United States Secretary of Education Richard W. Riley to American Educators at 4 <http://www.ed.gov/speeches/08-1995/religion.html> 16

1 Kate Mason Rowland, *The Life of George Mason* 244 (1892) 13

Joseph Story, *A Familiar Exposition of the Constitution of the United States* 259 (1854) 14

3 Joseph Story, *Commentaries on the Constitution of the United States* § 1871 at 728 (1833) 14

1 *The Debates and Proceedings in the Congress of the United States* 451, 758-59 (James Madison, June 8, 1789) (Gales & Seaton, eds 1834) 13

The Reports of Committees of the Senate of the United States, 32nd Cong. 2nd Sess. at 1-4 (1853) (*quoted in* David Barton, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, AND RELIGION 30-31 (1998)) 14

Wenkart, *Prayer in School: Can a Solution Be Found?* 138 Ed. Law Rep. 597, 597 (Dec. 1999) 19

BRIEF OF AMICI CURIAE TEXAS JUSTICE FOUNDATION AND OTHERS IN SUPPORT OF THE PETITION

Pursuant to Rule 37.2 of the Rules of this Court, amici curiae submit this brief in support of the Petitioner.[1]

INTEREST OF THE AMICI CURIAE

Texas Justice Foundation

The Texas Justice Foundation is a 501(c)(3) non-profit organization which provides free legal representation in landmark cases involving limited government, free markets, parental rights and private property rights. The Foundation seeks, through litigation and education, to protect the fundamental freedoms essential to the preservation of American society. The Foundation is deeply concerned about the free speech rights and free exercise of religious expression of students in the State of Texas.

Beth Long

Beth Long is the Student Body President at her high school in Mission, Texas. Due to the Fifth Circuit decision below, Ms. Long was not allowed to lead a prayer as part

[1] All of the parties have consented to the filing of this Amicus Brief. A joint letter of consent has been filed with the Clerk's Office consenting to the filing of amicus briefs. No counsel for either party authored this amici curiae brief, either in whole or in part. Furthermore, no persons other than amici curiae and their counsel contributed financially to the preparation of this brief.

of her opening address at the football games for the 1999 football season, though elected by her fellow students to do so. She was threatened that if she attempted to lead her fellow students in a prayer as part of her opening address she would lose her position as Student Body President. Ms. Long gave up the privilege of giving the opening address and instead went to the center of the football field at the start of the games with representatives of the Fellowship of Christian Athletes to voluntarily pray before the game. Ms. Long believes that as Student Body President she has the right to lead her fellow students in a voluntary prayer.

Students

The following are Texas high school students who have been adversely affected by the Fifth Circuit decision below. These students feel a deep sense of loss from not being allowed to have their traditional right of religious expression allowed before their football games and other sporting events. These students believe that a student has the right to lead other fellow students in a student initiated, voluntary prayer.

Robin Airheart
Beverly Anderson
Michael Barranco
John Bedford
Britney Kay Buchanan
Kyle Dahlberg
Sean Desha
Justin Dorsey
Shalin Eddy
Michelle Friesenhahn
Julie Garcia
Courtney Glover
Sarah Szuminski
Lauren Talbert
Kristen Thomas
Matt Glover
Ben Guenther
Ellen Hamner
Melissa Hamner
Lauren Hess
Nels Jacobson
Amy Kritt

Lauren Lawson
Jennifer Leman
Matt Lusk
Drew Lusk
Charlie Malmberg
Theresa C. Vela
Rochelle Villafranca
Adam Ward
Seth McKinley
Bo Mechinus
Steven Nason
Tanya Sammis
J.B. Sigmon
Stephanie Slate
Krystal Slate
Rebecca Smith
Danielle Smith
Kawika Solidum
Karen Stewart
Kacee Surratt
Katie Wheeless

Parents

The following are parents of students in the Texas public school system that have been adversely affected by the Fifth Circuit decision below. These parents are very concerned about their children's rights to free speech and the free exercise of religious expression and they feel that these rights are being violated by the underlying Fifth Circuit decision. They feel that their children have the constitutional right to voluntarily pray before football games and other sporting events and to be led by a fellow student elected by the students in this prayer.

Jamie Abernathy
Linda Albers
Bill Bedford
Jeanne Bedford
Roger Edward Belveal
Glenda Beyer
Ronnie Bless
Isabelle Bless
Michael Bliss
Patricia Bodiford
Billy Bodiford
Blanca Bonner
Lushile Bruchmiller
Rhonda Bustos
Sherrie Carey
Betty Clark
Judy Desha
Scott Desha
Ashley Desha
Susie Escamilla
Rebecca Hamner
Tina Harrell
Yvette Hernandez
Richard Hillyard

Sandra Hyatt
C. Leroy Jacobson
Rebecca Landis
Larry Lawson
Sheila Lawson
Don Long
Darrel McMaster
Margaret Mechinus
Henry Medrano
Amy Medrano
Patricia Ormond
Richard Ormond
Rene Palmer
Cynthia Rodriguez
Lee Roscoe
Donna F. Russell
A. Wayne Russell
Ruby Stotts
Bill Talbert
Debbie Talbert
Jerri Lynne Tanner
Debra Temple
Greg Temple
Billie Thomas
Donald Thomas
Raelyn Van Pelt
Karen Warren
Paul G. Wilke
Constance Wilke

Teachers

The following are teachers in the State of Texas who support the constitutional rights of their students to free speech and the free exercise of religious expression. They believe, as teachers, that allowing students the free exercise of religious expression creates a better academic and social environment for all their students. It promotes tolerance, respect for authority and love of others. They support the First Amendment. These teachers believe that government can neither mandate nor censor values, and therefore, they are in support of this Amicus Brief.

Lisa Caffey
Karen Eisenhauer
Michele Gonyer-Russell
Esther Heiligman
Donna Legenorg-Hofmann
Glenna Roscoe
Mitchell Silvia
Melissa Vinez
Janice Whitwell

Blanco Independent School District

Blanco Independent School District is a school district in the State of Texas. The district is responsible for

writing policies for the schools within the district. The district feels it has a constitutional obligation to protect the religious liberty and free speech rights of students and therefore has an interest in the underlying case.

Legislators

The following are State Legislators in the State of Texas who are deeply concerned about the free speech rights and free exercise of religious expression of their constituents.

Representative Leo Berman
Representative Kim Brimer
Representative Betty Brown
Representative Frederick Brown
Representative Wayne Christian
Representative Ron Clark
Representative Frank Corte, Jr.
Representative Dianne Delisi
Representative Tony Goolsby
Representative Rick Green
Representative Kent Grusendorf
Representative Richard Hardcastle
Representative Will Hartnett
Representative Harvey Hilderbran
Representative Bob Hunter
Representative Carl Isett
Representative Phil King
Representative Mike Krusee
Representative Jerry Madden
Representative Ken Marchant
Representative Geanie Morrison
Representative Gene Seaman
Representative John Shields
Representative John Smithee

Representative Todd Staples
Representative Robert Talton

SUMMARY OF THE ARGUMENT

I.

Like all Americans, students have religious liberty because they do not shed their constitutional rights at the schoolhouse gate. Allowing students to exercise their religious rights is not an establishment of religion because it is student-initiated and student-led prayer. Invocations or messages that are not scripted, supervised, endorsed, suggested, or edited by the school pass constitutional muster. The danger created by *Santa Fe v. Doe* is that school officials will feel that they must censor or edit this speech to insure that it is nonsectarian and nonproselytizing. Viewpoint discrimination and censorship have been strongly condemned by this Court because they are unconstitutional and violate the religious liberty of students. Furthermore, removing all religion from the public schools would create an environment of anti-religion or atheism. Promoting atheism is not consistent with either the intent of the Founding Fathers or the principle of neutrality. Student-led, student-initiated prayer at football games does not violate the Establishment Clause, and therefore, the lower court's decision should be reversed.

II.

The Establishment Clause and the Free Exercise Clause of the First Amendment should be read in harmony because they share a common purpose to secure

religious liberty. The two religion clauses must be properly balanced or else government neutrality becomes government hostility toward religion. Suppression of student-initiated and student-led religious speech is not necessary to meet constitutional standards nor does it achieve constitutional neutrality of religion. In fact, it demonstrates a hostility toward religion which is unconstitutional. Student-initiated, student-led religious speech is constitutional because it strikes a proper balance between the Establishment Clause and the Free Exercise Clause, and therefore, an invocation, message, or prayer should be allowed in this case.

ARGUMENT

I. PETITIONER'S POLICY PERMITTING STUDENT-LED, STUDENT-INITIATED PRAYER AT FOOTBALL GAMES PASSES CONSTITUTIONAL MUSTER UNDER THE ESTABLISHMENT CLAUSE.

In 1969 during the heat of the Vietnam protests, this Court correctly articulated the principle that students do not shed their rights at the schoolhouse gate. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969). Furthermore, a student's religious speech does not become forbidden "state action" when the student walks through the schoolhouse door. *Chandler v. James*, 180 F.3d 1254, 1261-62 (1999).

Over the last thirty years, this Court has had the opportunity to analyze numerous cases concerning students' religious rights. *Santa Fe ISD v. Doe* has confused the issues and created great concern by students, parents,

teachers, school districts, and legislators as they struggle to comply with the law while allowing students to exercise their religious rights and liberty. Petitioner's policy permitting student-led, student-initiated prayer at football games does not violate the Establishment Clause.

A. Allowing the Free Exercise of Religion Is Not an Establishment of Religion, and Therefore, Student-Led, Student-Initiated Prayer Merely Allows Students to Express Their Religious Views.

Allowing students, either inside or outside the school building, to express their views on religious ideas is not an establishment of religion. *Board of Education v. Mergens*, 496 U.S. 226, 250 (1990); *Chandler v. James*, 180 F.3d 1254, 1258 (11th Cir. 1999). Having a policy that allows students to voluntarily give a message or invocation merely keeps the government from discriminating against students based on their particular viewpoint, whether religious or secular. In its prior rulings, this Court has cleansed the public school forum from any government-sponsored, government-initiated prayer or religious speech. *See, e.g.*, *Lee v. Weisman*, 505, U.S. 577 (1992) (finding violation where school selected the clergyman who was a rabbi); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) (finding school reading Bible verses over the intercom was unconstitutional as state action); *Engel v. Vitale*, 370 U.S. 421 (1962) (finding school prayer that was directed by and composed by the Board of Education was unconstitutional as state action); *McCollum v. Board of*

Education, 333 U.S. 203 (1948) (finding religious instruction in public schools a violation of the establishment clause as state action).

In the Santa Fe ISD policy, everything was student initiated or led without any direction from school officials. *Doe v. Santa Fe ISD*, 168 F.3d 806, 811 (5th Cir. 1999). The students selected the individual who would give the message or invocation. *Id.* That student composed the message or invocation and that student voluntarily gave the message or invocation without coercion or endorsement by the school. As Judge Jolly correctly concludes in his dissent, it is constitutional where "school policy is the neutral accommodation of non-coerced, private, religious speech, which allows students, selected by students, to express their personal viewpoints. The state is not involved. The school board has neither scripted, supervised, endorsed, suggested, nor edited these personal viewpoints." *Doe v. Santa Fe ISD*, 168 F.3d 806, 835 (5th Cir. 1999) (Jolly, J. dissenting) *accord Doe v. Duncanville ISD*, 70 F.3d 402, 404-05 (5th Cir. 1995) (delineating between school-sponsored religious activities and student-led activities).

In the lower court opinion, the court characterized the situation by stating that "SFISD allowed students to read overtly Christian prayers from the stage at graduation ceremonies and over the public address system at home football games." *Doe v. Santa Fe ISD*, 168 F.3d 806, 810 (5th Cir. 1999). The key word in this characterization is that the school district allowed such speech. The school district did not script, supervise, endorse, suggest, or edit the personal views of the student before the football game, and therefore, it passes constitutional standards.

Part of the problem that this case and others have created is a fear on behalf of the schools that they must censor or edit what the student is going to say. This type of activity definitely violates the constitutional standard. When government feels compelled to review, edit, and/or censor the religious or political speech of students, it has trampled on the most sacred of the our constitutional rights. How can the Constitution be interpreted to require the government to censor speech? The Constitution does not require the government to censor its people. Quite the contrary, it requires that the government allow the free exercise of religious and other types of speech even if that speech may be offensive to some.

The lower court's opinion which requires a nonsectarian, nonproselytizing message places the school district in the position of being government censor. Such behavior by the government is unconstitutional and violates the religious liberty of its students. *See Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). This Court strongly condemned such conduct stating that "Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* at 829. Indeed, this is exactly what transpired when school officials "screened" the text of the graduation invocations and benedictions for content prior to the ceremony. *Doe v. Santa Fe ISD*, 168 F.3d 806, 810 (5th Cir. 1999).

There are members of the *Amici* that have also faced this type of censorship. For example, Beth Long is student body President at Mission High School. In that

capacity, she was selected to give the welcome address and invocation before the football games. School officials read, edited, and censored some of the language that was in her welcome address and invocation because of the religious content. She was then advised that if she proceeded with the original message and invocation, she would be stripped of her position. This Christian student was then forced to either give up her position or the expression of her religious beliefs. This is a choice that no American should have to make. The Texas Justice Foundation believes that her constitutional rights were violated and that there was egregious content discrimination. Student-led, student-initiated religious speech does not violate the First Amendment.

The principle of neutral accommodation is fully consistent with this Court's recent pronouncements. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 587 (1992) (recognizing that schools may accommodate the free exercise of religion, but finding a violation in that case because the school selected the clergyman who was a rabbi); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 842 (1995) (finding the government must be neutral and may accommodate a wide spectrum of student groups including those with sectarian activities), and *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 13-14 (1993) (upholding a neutral government program giving aid to individual handicapped children which can be used in a sectarian school).

Petitioner's policy permitting student-led, student-initiated prayer at football games does not violate the Establishment Clause. Messages or invocations that are student-led and student-initiated comport with this

Court's rulings concerning the First Amendment. Neutrality would require that if one student may select a non-religious message at a football game then another student may select a religious message without the government censoring or editing the speech.

B. Permitting Voluntary Messages or Invocations Is Also Consistent with the Intent of the Founding Fathers.

When deciding Establishment Clause cases, the intent of the Founding Fathers is important to properly interpret the case. Justice Brennan has stated that the Court's decision must be one that "accords with history and faithfully reflects the understanding of the Founding Fathers." *Walz v. Tax Commission*, 397 U.S. 664, 680 (1970) (Brennan, J., concurring). This is a principle that he had articulated some years earlier stating "the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers. It is a line which the Court has consistently sought to mark in its decisions expounding the religious guarantees of the First Amendment." *School District of Abington Township v. Schempp*, 374 U.S. 203, 294 (1962) (Brennan, J., concurring).

Chief Justice Rehnquist makes this point even more strongly and suggests the ramifications of failing to do so when he states: "The true meaning of the Establishment Clause can only be seen in its history. As drafters of our Bill of Rights, the Framers inscribed the principles that control today. Any deviation from their intentions frustrates the permanence of that Charter and will only lead

to the type of unprincipled decision-making that has plagued our Establishment Clause cases since *Everson*." *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J. dissenting).

Over the years, there has been much discussion about the intent of the Founders. Chief Justice Rehnquist provided one of the more detailed discussions in *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985) (Rehnquist, J. dissenting). The words of the Founders provide compelling evidence of their intent and the following are a few examples. For a detailed discussion, *see generally* David Barton, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, AND RELIGION ch. 2 (1998); T. Jeremy Gunn, A STANDARD FOR REPAIR ch. 2 § B (1992).

George Mason, who was a member of the Constitutional Convention and called the "Father of the Bill of Rights" indicated: "[A]ll men have an equal, natural and unalienable right to the free exercise of religion, according to the dictates of conscience; and that no particular sect or society of Christians ought to be favored or established by law in preference to others." 1 Kate Mason Rowland, *The Life of George Mason* 244 (1892).

James Madison proposed: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established . . . " 1 *The Debates and Proceedings in the Congress of the United States* 451 (James Madison, June 8, 1789) (Gales & Seaton, eds. 1834). During the debates, Madison believed that if the word "national" was inserted before religion, it would "point the amendment directly to the object it was intended to prevent." *Id.* at 758-59.

Justice Story emphasized the concern about a national religion stating: "We are not to attribute this [First Amendment] prohibition of a national religious establishment to an indifference to religion in general, and especially to Christianity, (which none could hold in more reverence, than the framers of the Constitution) . . . " Joseph Story, *A Familiar Exposition of the Constitution of the United States* 259 (1854).

The House and Senate Judiciary Committee Reports contained similar statements concerning the meaning of the establishment of religion. For example, the Senate Judiciary Committee emphasized that the Founders intended to prohibit an establishment of religion such as the English Church. They had "no fear or jealousy of religion itself, nor did they wish to see us an irreligious people . . . " *The Reports of Committees of the Senate of the United States*, 32nd Cong., 2nd Sess. at 1-4 (Robert Armstrong, ed. 1853) (*quoted in* David Barton, Original Intent: The Courts, The Constitution, and Religion 30-31 (1998)).

Justice Story writes in his Commentaries on the Constitution: "The real object of the [First A]mendment was . . . to exclude all rivalry among sects and to prevent any national ecclesiastical establishment which should give to a hierarchy [a denominational council] the exclusive patronage of the national government." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1871 at 728 (1833).

Thus, the Founding Fathers intended that a national religion such as they had experienced in England with the Church of England was prohibited. In addition, the

Founders did not want one particular religious denomination or sect to have preference over another. "As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means." *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J. dissenting).

A message or invocation that is student-initiated and student-led does not violate the original intent of the Founding Fathers. Such public prayer would be encouraged and was in fact practiced as evidenced by the fact that the Congress that passed the Bill of Rights was the one that asked George Washington to proclaim a day of public thanksgiving and prayer to acknowledge what God had done for them. Voluntary public acknowledgement of God's guidance and blessings is still needed today.

In a cover letter to American Educators, United States Secretary of Education Richard W. Riley summarized this issue by stating:

> Finally, I encourage teachers and principals to see the First Amendment as something more than a piece of dry, old parchment locked away in the national attic gathering dust. It is a vital living principle, a call to action, and a demand that each generation reaffirm its connection to the basic idea that is America – that we are a free people who protect our freedoms by respecting the freedom of others who differ from us.

Our history as a nation reflects the history of the Puritan, the Quaker, the Baptist, the Catholic, the Jew, and many others fleeing persecution to find religious freedom in America. The United States remains the most successful experiment in religious freedom that the world has ever known because the First Amendment uniquely balances freedom of private religious belief and expression with freedom from state-imposed religious expression.

Public schools can neither foster religion nor preclude it. Our public schools must treat religion with fairness and respect and vigorously protect religious expression as well as the freedom of conscience of all other students. In so doing our public schools reaffirm the First Amendment and enrich the lives of their students. Letter from United States Secretary of Education Richard W. Riley to American Educators at 4 <http://www.ed.gov/speeches/08-1995/religion.html>

The First Amendment is a vibrant, living document which stands vigil against government censorship or discrimination. The danger of attempting to rid all religion from the public schools is that the government would create an environment of anti-religion. *See Torcaso v. Watkins*, 367 U.S. 488, 495 (1961). " . . . [N]othing in the Establishment Clause requires government to be strictly neutral between religion and irreligion . . . " *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J. dissenting).

Justice Douglas, writing the opinion in *Zorach*, summarized these principles as follows:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe." *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952).

The American people are a religious people who want to express their religious beliefs. For example, it is reasonable to assume that if there were a room full of 100 students who were allowed by the government to freely discuss any subject, some would talk about politics, sports, religion, and a wide variety of other topics. Students should be allowed to express their opinions and beliefs about such topics without fear of government censorship or discrimination. The First Amendment provides freedom *of* religion and not freedom *from* religion. Thus, students should be allowed to express their religious views when it is purely voluntary, student-initiated, student-led speech.

Government must not show a callous indifference to religious groups. Nor must it favor or give preference to non-religion. To do so would violate the Establishment Clause by favoring or sponsoring atheism or disbelief of God instead of a belief in God. The Constitution requires neutrality, and therefore, the government may not prefer disbelief over religion. *Chandler v. James*, 180 F.3d 1254, 1261 (11th Cir. 1999). "Tolerance of disbelief does not require that we deny our religious heritage, nor elevate atheism over that heritage." *Id.* at 1261 n.11. The constitutional requirement is that the government tolerate both while establishing neither. *Id.*

Our Founding Fathers were a religious people who were frustrated by the lack of religious liberty in England. Feelings of frustration and disenfranchisement led to chaos and revolution for the sake of religious liberty. The Founding Fathers expected that their faith would be carried on by future generations who would have secured religious liberty by the protections of the First Amendment. Likewise, the student Amici are religious students who feel a deep sense of frustration and loss concerning the limitations on religious liberty, and therefore, they are asking that government maintain a stance of neutral accommodation of their religious beliefs.

II. THE ESTABLISHMENT CLAUSE AND THE FREE EXERCISE CLAUSE SHOULD BE READ IN HARMONY BECAUSE THEY SHARE A COMMON PURPOSE TO SECURE RELIGIOUS LIBERTY.

This Court has been unanimous on the principle that the common purpose of the two religion clauses is to

secure religious liberty. *Wallace v. Jaffree*, 472 U.S. 38, 68 (1985) (O'Connor, J. concurring). Although unanimous on the purpose of the two clauses, the courts have struggled to balance the requirements of the Establishment Clause with the Free Exercise and Free Speech Clauses. Wenkart, *Prayer in School: Can a Solution Be Found?* 138 Ed. Law Rep. 597, 597 (Dec. 1999).

Unless there is a proper balance between the religion clauses, government neutrality becomes government hostility toward religion. *Chandler v. James*, 180 F.3d 1254, 1261 (11th Cir. 1999). Suppression of student-initiated and student-led religious speech is not necessary nor does it achieve constitutional neutrality of religion. *Id.* In fact, discriminatory suppression of student-initiated and student-led religious speech demonstrates a hostility toward religion which is unconstitutional. *See School District of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J. concurring).

Without a proper balance, government would have a callous indifference that was not intended by the Establishment Clause and government would be at "war with our national traditions as embodied in the First Amendment's guaranty of the free exercise of religion." *McCollum v. Board of Education*, 333 U.S. 203, 211-12 (1948).

In striking this balance, there is no constitutional violation even if students are freely advancing religion. *See Chandler v. James*, 180 F.3d 1254, 1262 (11th Cir. 1999). This Court has recognized that not every law that confers

an indirect, remote, or incidental benefit is constitutionally invalid. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973). Thus, even if students are vigorously advancing their religion, it does not violate the Establishment Clause because it is student-initiated, student-led religious speech which is protected by the Free Exercise and Free Speech Clauses. *Chandler v. James*, 180 F.3d 1254, 1263 (11th Cir. 1999).

Student-initiated, student-led, religious speech is constitutional because it strikes a proper balance between the Establishment Clause and the Free Exercise Clause. The government in this case did not establish, endorse, coerce, censor, or edit student speech, and therefore, it meets the constitutional standards. Furthermore, individuals are allowed to exercise their religious rights just as any nonsecular speakers would be allowed to do. Thus, the government can maintain neutral accommodation of religious speech within the framework of the First Amendment.

CONCLUSION

The decision of the United States Court of Appeals for the Fifth Circuit should be reversed because Petitioner's policy permitting student-led, student-initiated prayer at football games passes constitutional muster under the Establishment Clause.

Respectfully submitted,

LINDA L. SCHLUETER
Texas Bar No. 24000127
8122 Datapoint, Suite 812
San Antonio, TX 78229
Phone: 210-614-7157
Fax: 210-614-6656
Counsel for Amici Curiae